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No. 93-84

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

SHELL OIL COMPANY,

Petitioner,

v.

EDWARD L. NELSON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeal for the State of California
Second Appellate District, Division One

OPPOSITION TO PETITION

**G. Dana Hobart
Hobart & Heeringa
Donald Caffray
4676 Admiralty Way, Suite 801
Marina del Rey, California 90292
(310) 306-0063
*Attorneys for Respondents
Charlotte Nelson, et. al.*

**Counsel of Record
August 15, 1993

BEST AVAILABLE COPY

Lorraine Mitchell Legal Briefs

732 E WASHINGTON BOULEVARD
LOS ANGELES CALIFORNIA 90021-3088
(213) 747-5831 • FAX (213) 747-5843

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QUESTIONS PRESENTED

Respondents respectfully submit that there are no questions presented for review in Shell Oil Company's Petition for Writ of Certiorari which have not been fully decided and settled by this Court's rulings in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.ed.2d 1 (1991) and TXO Production Corp. v. Alliance Resources, 61 U.S.L.W. 4766 (U.S. June 22, 1993).*

* The decision concerning which petitioner herein seeks the intervention of this Court is an unpublished opinion which, under California law, denotes an opinion that does not incorporate any new, significant or conflicting legal principles. (See California Rules of Court, Rule 976(b)). It is therefore deemed to have no precedential value and cannot be cited as precedent for any issue or subject discussed in the decision. (California Rules of Court, Rule 977(a))

PARTIES TO THE PROCEEDING

The Petitioner, Shell Oil Company, is a Delaware corporation with its principal place of business in Houston, Texas.

The Respondents are Charlotte Louise Nelson, Sharlee Lou (Nelson) Welsh, and Mary Jo (Nelson) Settles, as trustees of the Nelson Trust.

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OPPOSITION TO PETITION

INTRODUCTORY STATEMENT

It is clear that the three so-called federal constitutional questions Shell Oil Company ("Shell") purports to raise were completely resolved by this Court in its two recent decisions on the subject.[1] TXO Production Corp. v. Alliance Resources Corp., ___U.S.____, no. 92-479, established the constitutionality of substantial punitive damages under the Federal Constitution where (as in TXO, and much more so here) the defendant

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1. To support its claims in light of these decisions, Shell has resorted to patent distortions and omissions of relevant facts supporting the trial court's conclusions, including:

"The court cannot overstate its assessment of Shell's cold, ruthless plan to profit off the life savings of an elderly couple." (Appendix C to Shell's petition, p. 33a)

The trial court also found that "Shell's conduct is at the outer limits of intolerable business practice." (Id., p. 31a)

pursued a "malicious and fraudulent" course of conduct, "part of a larger pattern of fraud, trickery and deceit." (TXO plurality opinion, p. 17. See also Id., pp. 14-16.)

Pacific Mutual Life Ins. Co. v Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) confirmed that the due process clause of the United States Constitution permits substantial punitive damages when utilized to "advance the State's interest in minimizing fraud" (111 S.Ct. at 1041) and that a substantial punitive damage award is constitutional when it is based on a defendant's failure to prevent its agent from committing fraud. (Id., pp. 1040-1041) Shell's conduct at bar is far more egregious as it not only knew of and authorized the Nelson fraud, its

instruction manual tutored such fraud as a standard procedure for doing business. (See also TXO, concurring opinion of JUSTICE KENNEDY, pp. 3-4, noting that TXO was "not a case of negligence, strict liability or respondeat superior," but a case of intentional "'fraud, trickery and deceit'" and "'unsavory and malicious practices.'")

Shell's petition brings to mind Yogi Berra's celebrated apothegm, "It's deja vu all over again." TXO's corpus has scarcely cooled, but its message has not deterred Shell from raising punitive damage challenges plainly laid to rest by TXO and Haslip.

Shell's apparent objective in filing its petition while the TXO opinion is still warm is not to secure consideration by this Court. Rather, Shell urges yet

another round of review by the California courts.[2] Shell asks for an order remanding this case "for reconsideration in light of TXO." (Shell's petition at pp. 16, 20, 26) Shell relies on this Court's order remanding H.C. Hanson v. American National Bank and Trust Co., 844 S.W. 2d 408 (Ky. 1992). (Petition, pp. 7, 8, 14, 15, 16) Shell does not mention

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[2] The current unpublished opinion of the Court of Appeal (Nelson III) is annexed to Shell's petition at pp. 2a-24a. In addition, the California Courts of Appeal have issued two other opinions, filed May 24, 1989 and October 21, 1991, referred to in the current opinion as Nelson I and Nelson II respectively. (Nelson III, Shell's petition, pp. 3a, 7a)

For this Court to have a more complete picture of the proceedings in this case, respondents annex the two earlier opinions hereto as appendices, pp. 1A-91A of the annexed appendices.

Citations to "Pet. App." refer to the pertinent pages of Shell's appendix. Citations to "Rspts.' App." refer to the appendices we have annexed and include Nelson I and Nelson II.

the other cases pending at the time TXO was decided where this Court denied certiorari.

As shown below, no justification whatever exists for further proceedings in Nelson v. Shell which has been critically analyzed three times by the California Courts of Appeal and twice presented by Shell to the California Supreme Court. This litigation should now be laid to rest.

A. THE FACTS

The facts are detailed in the most recent opinion of the Court of Appeal, annexed to Shell's petition. (Pet. App., pp. 2a-24a)[3] Briefly stated, these

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[3] Contrary to Shell's statement (Petition, p. ii), Edward L. Nelson is not a party to this proceeding, having died 14 years ago, in mid-1979. (Opinion of the Court of Appeal, Pet. App., p.7a.) The respondents are Charlotte Nelson, the widow of Edward Nelson, and the Nelsons'

facts establish that a corner lot which had been owned by members of the Nelson family since 1942 was scheduled for condemnation by Caltrans, an agency of the State of California. (Opinion, Pet. App., pp. 3a, 5a) Shell had leased the property for use as a service station since 1950. (Id., p. 3a) Shell and Lewis, its real estate representative, learned in 1975 of the prospective condemnation, but the Nelsons (who lived in Leisure World, in another county) did not. (Id., pp. 3a-5a)[4]

Lewis knew that under California law a lessee with a favorable lease could

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two daughters, Sharlee Lou Welsh and Mary Jo Settles, trustees of the Nelson Trust. (Nelson I, Rspts.' App. p. 3A, n. 2.)

[4] Shell implies the Nelsons knew of the prospective condemnation. (Pet., p.3) This is contrary to the findings (Pet. App., p.32a) and illustrates Shell's revisionist presentation.

claim a share of the condemnation proceeds which would otherwise go to the property owner. (Pet. App., pp. 5a-6a) Although Shell had 10 years remaining on its lease, Lewis tried and failed in 1976 to extend the lease by 15 additional years. (Id., p. 4a) Then, in 1978, when Mr. Nelson was in failing health, Shell "pressured" Mr. Nelson to give it the options it wanted. (Respts.' App., p. 82A) Taking advantage of the circumstance that the Nelsons owed Shell $5,625, Lewis told Mr. Nelson he had two choices: either repay the debt or agree to three five-year options to extend Shell's current lease to the year 2001, on terms advantageous to Shell. (Id., pp. 4a, 5a) At the time, Mr. Nelson, almost 80 years of age, had been having serious health problems and in fact died within a year.

(Id., pp. 4a, 7a)[5]

To further motivate Mr. Nelson to grant Shell the desired options, Lewis falsely told him that Shell looked forward to many years of business there, and had long-range plans for the station. He also solicitously affirmed to Mr. Nelson that the monthly rental check would be comforting to Mrs. Nelson and offered her financial security should anything happen to Mr. Nelson. (Opinion, Pet. App., p. 5a) These representations were made even though Lewis knew the subject property was scheduled for condemnation and Shell had no long-term plans. (Id., pp. 5a-6a)

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[5] With no support in the record, Shell represents that this ill, 80-year old man could be perceived as "relatively sophisticated." (Pet., p. 10.)

Thus, Shell's factual revision which asserts that the finding of fraud was based only on Shell's concealment of the impending condemnation (Petition, p. 3) is materially misleading. The findings of fraud are based on the express misrepresentations to Mr. Nelson that Shell had long term plans for the property and that he was providing his wife with long term financial security. Shell's real objective was to obtain the options to drastically reduce the assets of this elderly couple by placing itself in position to claim $620,000 of the $975,000 condemnation proceeds which otherwise would go to the Nelsons alone. (Opinion, Pet. App., pp. 7a, 8a)

In making these false representations, Shell's real estate representative (Lewis) acted upon "'the

offensively manipulative advice printed in Shell's base lease manual'" (Pet. App., p. 7a, quoting from Nelson II.) "Base Lease Manual" is the title of a training and policy manual which Shell's real estate representatives were instructed to follow in their real estate dealings. (Id., p. 6a) The manual instructed Shell's real estate representatives, including Lewis, in the use of manipulative tips and techniques to defraud and mislead property owners in California and elsewhere. Some instructions were directed squarely at cheating the elderly. For example:

> "[W]hen Shell wants to secure a long term lease from 'an owner who is middle-aged or slightly beyond,' the representative should tell the owner that 'a long lease gives...security of income for...old age,...[.]' It [the manual] suggests reminding an owner that, 'After a man dies, his family is

> always better off if it has a steady income....It is very difficult to plan an estate on a short-term lease. Widows and children need the protection afforded by the experience and ability of a successful business man. That protection can be extended by an owner through the use of [a] long-term lease.'" (Opinion at p 6a, quoting from Nelson I.)

Lewis' misrepresentations that the lease options would afford Mrs. Nelson financial security were a direct application of the foregoing technique.

Other examples of the manual's teaching of fraudulent techniques included "suggestions on how to minimize a lease feature by hurrying along, joking, or grouping together and dismissing as unimportant the desired feature" sought by the property owner. (Pet. App., p. 6a) Another technique taught by the manual is that of "placing the owner in a 'defensive position' and

in a 'frustrated position'" when negotiating leases. (Ibid.) Lewis employed this ploy by his oppressive use of the Nelsons' debt to Shell. (Pet. App., p.4a; Respts.' App., p. 10A)

In March 1983, five years after Shell fraudulently obtained the options, Charlotte Nelson (by then a widow) was first advised by Caltrans that the property was to be condemned for construction of the Century Freeway. In November 1984 she learned Shell was claiming two-thirds of the condemnation award. According to Shell's expert, the value of the three five-year options was $620,000, based on his opinion that the fair rental value of the property was $7,900 per month, almost $7,000 per month more than the rental provided by the options. (Opinion, Pet. App., p. 7a)

B. THE HISTORY OF THIS LITIGATION

This litigation commenced on June 18, 1985, when Caltrans filed a complaint in eminent domain against the Nelsons and Shell. (Pet. App., pp. 3a, 8a) Caltrans included Shell in the litigation because Shell continued to assert its claim to two-thirds of the condemnation award, based on the fraudulently procured options. (Pet. App., pp. 7a, 8a) The Nelsons filed a cross-complaint against Shell seeking rescission of the options and damages for fraud. (Id., p. 8a)

The case was first tried in 1987. (Pet. App., p. 8a) The fraud cause of action was tried to a jury, which returned special verdicts, finding Shell had committed fraud. (Pet. App., p. 8a) The rescission cause of action was tried to the court which also made a finding of

fraud, granted the Nelsons rescission and assessed $1,900,000 in punitive damages, less certain minor deductions. (Id.) The trial court also granted Nelson's post-trial motion for a new jury trial on the issue of damages on their fraud cause of action. (Id., pp. 8a-9a) Shell appealed the judgment of rescission and the judgment on the jury verdict. (Pet., p. 4; Pet. App., p. 9a)[6]

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[6] Shell now relies on the jury's verdict as demonstrating that there were fact-finders who would view its sordid transaction as less loathsome. (E.g., petition at p. 10.) However, the trial court's grant of a new trial established that the jury award was flawed. Although Shell now embraces that award, Shell appealed the judgment on the jury verdict. (Petition, p. 4) The Court of Appeal in Nelson I determined that the Nelsons had elected the remedy of rescission (Rspts.' App., p. 24A); hence, the jury's determination has long ceased to be of any relevance.

Upon retrial, after the first round of appeals, Shell waived its right to a second jury trial. (Rspts.' App., p. 83A)

Shell attacked the punitive damage awards on several grounds following the first trial, but it did not claim that the awards violated the United States or California Constitutions. (See Opinion in Nelson I, Rspts.' App., pp. 1A-42A, discussing the issues raised by Shell.)

On May 24, 1989 the California Court of Appeal filed its first opinion; it reversed the award of punitive damages on the rescission cause of action on the ground that "no evidence of actual damages had been presented in the rescission trial." (Rspts.' App., p. 83A) However, the Court of Appeal affirmed that part of the trial court's decision which found that Shell had committed fraud and that the Nelsons were entitled to rescission. (Pet. App., p. 9a)

The case returned to the trial court, which granted respondents' motion for a new trial on the issue of damages on the rescission cause of action. (Id.)

At the second trial the Nelsons established that they had sustained various items of compensatory damages. (Id.) Additional evidence also established that Shell had taken no steps whatever to discontinue the use of its Base Lease Manual during the three years between trials. (Pet. App., pp. 11a-12a) The trial court found from this evidence that during the three year interim "Shell was continuing to utilize the 'manipulative techniques advanced in the manual.'" (Pet. App., p. 12a) The trial court assessed punitive damages of $6,295,000, based on its conclusion that Shell's continued use of the manual after

the first trial and appeal established the need for a far greater deterrent than the original $1,900,000 punitive damage award, which demonstrably had had no deterrent effect on Shell. (Id.)

Shell again appealed. The Court of Appeal again reversed portions of the judgment. The Court held that certain items of compensatory damages were improperly awarded and reduced the award of compensatory damages accordingly. (Pet. App., pp. 9a-11a, 19a)

The Court also reexamined the factual basis for the trial court's award of punitive damages. The Court held that the evidence supported the trial court's original award of $1,900,000 punitive damages on the rescission cause of action, but the facts did not support the full amount of the trial court's increase

in punitive damages. (Rspts' App., pp. 80A-87A) The Court reasoned that the evidence in the second trial was insufficient to establish that Shell was continuing to utilize the fraudulent techniques advanced in the base lease manual. (Id., pp. 86A-87A)

The Court therefore held that the trial court abused its discretion in increasing the punitive damage award to $6,295,000. (Id.) The Court held that no further retrials would be required, directing the trial court to redetermine the issue of punitive damages consistent with the views expressed in its opinion. (Id., p. 90A)

The Court also addressed Shell's challenge to the constitutionality of punitive damages and Shell's assertion that "the absence of objective standards

deprives it of due process." (Nelson II, Rspts.' App., p. 89A) The Court of Appeal held that this argument had been considered and rejected by the United States Supreme Court in Haslip, supra, and by the California Supreme Court in Hasson v. Ford Motor Co., 32 Cal.3d 388, 402, note 2, 185 Cal.Rptr. 654, 650 P.2d 1171 (1982) (Rspts.' App., p. 89A)

Shell petitioned the California Supreme Court for review in November 1991. The California Supreme Court denied review without dissent. (Id., p. 92A)

Shell did not petition the United States Supreme Court after denial of review by the California Supreme Court.

After remand, the trial court reconsidered the evidence as directed by the Court of Appeal, and then reduced the compensatory damages to $268,891 and

reduced the punitive damages to $4,600,000. (Pet. App., p. 10a) The trial court issued a detailed Statement of Decision explaining its rationale for the punitive damage award. (See Point CI1, infra; Pet. App., pp. 28a-33a)

Shell appealed to the California Court of Appeal again, contending, among other things, that the punitive damage award violated rights protected by the United States and California Constitutions. The Court of Appeal rejected Shell's contentions and affirmed the judgment. (See Point CI2, infra.)

Shell petitioned the California Supreme Court in April 1993. (Pet. App., pp. 37a-62a) The petition relied on the happenstance that the TXO case was pending before this Court and that the California Supreme Court had granted

review in four cases to address punitive damages issues raised by Haslip, (supra), and by this Court's decision in the then-impending TXO case. (Pet. App., pp. 42a-43a) The pending cases relied on by Shell were Gourley v. State Farm Mut. Auto. Ins. Co., SO14133 (Court of Appeal Opinion unpublished); MGW, Inc. v. Fredericks Dev. Corp., 12 Adv. Cal. App. 4th 244, 6 Cal. Rptr. 2d 333; Wollersheim v. Church of Scientology, 10 Adv. Cal. App. 4th 370, 6 Cal. Rptr. 2d 532; and Hilgedick v. Koehring Fin. Corp., 12 Adv. Cal. App. 4th 330, 10 Cal. Rptr. 2d 76)(Pet. App., p. 42a)

In its most recent petition to the California Supreme Court Shell requested that the Court "hold this case so that it can be remanded for reconsideration after decision" in these four cases which Shell

incorrectly assumed would "be heard on the merits." (Pet. App., p. 43a) The California Supreme Court rejected Shell's requests and denied review of Shell's petition without dissent on May 26, 1993. TXO was then decided, (Pet. App., p. 1a) and soon thereafter the California court dismissed the four petitions for review as having been "improvidently granted." [7] (California Rules of Court, Rule 29.4(c))

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[7] The Court's order was issued on July 15, 1993. (California Supreme Court minutes, July 15, 1993.)

C. REASONS WHY THE PETITION SHOULD BE DENIED

I

SHELL'S FIRST CONSTITUTIONAL CLAIM HAS NO MERIT, SINCE THE TRIAL COURT UTILIZED THE PRECISE CRITERIA APPROVED IN HASLIP AND CONFIRMED IN TXO AND THE STANDARD OF APPELLATE REVIEW WAS WELL WITHIN THIS COURT'S GUIDELINES

The basis for Shell's shifting constitutional claims has been its expectation that this Court's then-impending decision in TXO, supra, would somehow support further protraction of this litigation. As it developed, however, there is nothing in TXO that supports Shell's position. Nor does TXO change, in any manner benefiting Shell, the law set forth in Haslip; and the California appellate courts have already twice rejected Shell's claims that the principles of Haslip affect the judgment

rendered herein. (Section B, supra.)

1. The trial court's detailed statement of decision demonstrates that the court applied the precise criteria approved by this Court in Haslip and ratified in TXO

Shell's first claim in its Point I is that California's punitive damage system violated procedural due process "by virtue of its subjective, vague criteria for assessing punitive damages." (Shell's Point I, pet., p. 9)

The vacant nature of this claim is demonstrated by the fact that the trial court issued a detailed statement of decision that set forth and applied criteria indistinguishable from those approved by this Court in Haslip.

For example, the first group of criteria discussed in Haslip is "whether there is a reasonable relationship

between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." (111 S.Ct. at p. 1045, item a)

The trial court found that the "harm likely to result from the defendant's conduct" included: (1) the exposure of numerous persons to Shell's fraudulent "leasing and condemnation practices" pursuant to "the program outlined" in Shell's Base Lease Manual (Pet. App., pp. 31a-32a) and, (2) cheating an elderly couple out of the bulk of the value of property they had owned since 1942. (Id., pp. 32a, 33a)

Other criteria discussed in Haslip refer to "the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's aware-

ness, any concealment, and the existence and frequency of similar past conduct." (Item b at p. 1045)

The trial court's Statement of Decision demonstrates that the court found Shell's conduct reprehensible in the extreme, since the court said that it "cannot overstate" its "assessment of Shell's cold, ruthless plan" (Pet. App., p. 33a) and that Shell's conduct "is at the outer limits of intolerable business practice." (Id., p. 31a) The Statement also refers to "the vulnerability of the victims coupled with their advanced age." (Id., p. 33a) The court noted that when Shell obtained the lease options Mr. Nelson was ill and 80 years of age and Shell was "fully aware of the Nelson's need for retirement security and that the deal Nelson was induced to accept would

undermine that security. The conduct should not be condoned in society." (Id., p. 33a) (Emphasis added.)

Other Haslip criteria refer to "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss." (111 S.Ct. at p. 1045, item c) The court's Statement explicitly discusses these elements. (See Pet. App., p. 33a)

These, and other findings it seems unnecessary to detail, clearly establish that the award in this case satisfies the factors set forth in Haslip. (See also Section II, infra.)

In Eichenseer v. Reserve Life Ins. Co. (5th Cir. 1991) 934 Fed.2d 1377, 1385, where the Court of Appeals found that the Haslip requirements were

satisfied, the Court pointed out that the case was tried by a judge who "must explain the conditions that require a particular award of punitive damages... and must justify the amount of punitive damages imposed against the defendant."

The TXO decision did not alter these principles. Rather, this Court reaffirmed that a substantial award of punitive damages is warranted where, as the trial court herein found, the defendant pursued a "malicious and fraudulent" course of action, "part of a larger pattern of fraud, trickery and deceit." (TXO, plurality opinion, p. 17. See also Id., pp. 14-16)

a) Shell's petition does not show that the court's findings deviated in any way from the principles of Haslip and TXO

In contrast to the foregoing which demonstrates the trial court's exacting adherence to the Haslip and TXO principles, Shell's petition does not raise any issue from TXO that would merit this Court's intervention. In Point I of its petition, Shell relies on the argument that the jury herein arrived at a different result than the trial court. (Pet., p. 10) As discussed above, the trial court found that the jury's verdict was tainted and set it aside. Neither party sought its reinstatement on the first appeal and on retrial Shell waived its right to a jury. (Note 6, supra) Thus, the jury verdict has been detached from this case since the first opinion of

the Court of Appeal, filed in May 1989. (Section B, supra, note 6)

Moreover, Shell has not cited any case to support its implied contention that in a civil action the United States Constitution requires that one trier of fact arrive at the same result as another. (Petition, pp. 16-20)

Employing linguistic legerdemain to claim the ratio here is 750-1, Shell argues that the ratio of punitive to compensatory damages is disproportionate. (Pet., p. 11) Independently, however, TXO makes it clear that the ratio is not controlling where the conduct is malicious, fraudulent, and part of the defendant's business methods. (TXO, plurality opinion, pp. 14-17) Of course, the actual ratio here is 17-1. (Pet. App., p. 19a)

The desultory nature of Shell's constitutional challenges is demonstrated by its assertion that financial condition ought not be considered (Pet., pp. 11, 20), despite TXO's reaffirmance of the Haslip holding that "the financial position" of the defendant is properly considered in assessing punitive damages. (Plurality opinion, p. 19)

2. Shell's claims concerning the California standard of review are without merit

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The other claim in Shell's Point I is that it was denied due process because of California's "deferential" standard of appellate review of punitive damage awards. (See Petition, Point I, p. 9) This claim is ironic. The history of this case (Section B, supra) demonstrates that Shell received meticulous appellate review in three appellate proceedings.

On Shell's first appeal, in Nelson I, the California Court of Appeal reversed the trial court's punitive damage award on the rescission cause of action. (Nelson I, Rspts' App., p. 39A) The Court of Appeal's rationale was that Nelson had presented no evidence of actual damages which, under California law, are required to support an award of punitive damages. (Id., pp. 36A-39A) Thus, in Nelson I the Court shielded Shell from the punitive damage award on the rescission cause of action.

On remand, the trial court took evidence of damages on the rescission cause of action and awarded compensatory damages, as well as punitive damages. (Section B, supra) When Shell appealed, the California Court of Appeal in Nelson II not only struck various items of

compensatory damages from the judgment, but also reversed the punitive damage award as excessive, based on a factual redetermination favorable to Shell, stating that the evidence was insufficient to conclude that Shell was in fact continuing to utilize the manipulative techniques advanced in the Base Lease Manual. (Pet. App., 12a)

The Court could have reasonably concluded that Shell's continued use of the techniques set forth in the Base Lease Manual was inferable from its complete failure to take any official action following the first trial to halt such use. The general use of inferences and circumstantial evidence is very broad under California law. (See, e.g., Willis v. Gordon, 20 Cal. 3d 629, 143 Cal. Rptr. 723, 574 P.2d 794 (1978), evincing

California's liberal use of inferences in an action for compensatory damages.) Nelson II illustrates that the Court of Appeal will take a more restrictive approach to the use of inferences in punitive damage cases.

In the present opinion, the California Court of Appeal defined the standard of review as follows:

> "An award of punitive damages may be upheld on appeal only where supported by the evidence and must be reversed where it is unsupported and appears to have been the result of passion and prejudice." (Nelson III Opinion, Pet., p. 17a) (Emphasis added.)

Utilizing this standard, the Court of Appeal scrutinized the trial court's findings and held that they supported the punitive damage award, based upon California criteria (which are, as detailed above, substantially the same as those

approved by this Court in Haslip).

Shell relies on statements by the California Supreme Court in Adams v. Murakami, 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P. 2d 1348, questioning whether California's system of appellate review was consistent with Haslip. (Pet., p. 13) The Court of Appeal addressed that claim in part III of its opinion (Pet. App., pp. 22a-24a) and concluded that "California's review of punitive damage awards is not violative of the constitutional guarantees of due process." (Id, p. 24a)

The subsequent unanimous denial of Shell's petition for review by the California Supreme Court demonstrates that Court saw no error in the Court of Appeal's conclusions regarding compliance with Haslip. Had the California Supreme

Court not agreed, it would have granted review in the light of Haslip and the pending TXO, as it did in the four punitive damage cases cited above (Section B, supra), Gourley, MGW, Inc., Wollersheim, and Hilgedick.

The California Supreme Court's denial of review also confirms that it saw no potential transgression of the federal constitution, notwithstanding that TXO was pending before this Court. Since this Court did not accept the defense position in TXO, it is even clearer that the California Supreme Court would not find any potential federal constitutional issue in Nelson v. Shell.

In its petition to the California Supreme Court, Shell asserted that "The first issue raised here is identical to that which will be decided in these four

cases. . . [i.e., Gourley, MGW, Inc., Wollersheim, and Hilgedick.]" (Emphasis added.) (Pet. App., p. 43a) That "identical" issue is a virtual mirror image of Shell's first "Question Presented" before this Court. Since the California Supreme Court has now dismissed reviews of those four cases following the TXO decision, there is no reason at all to remand Nelson for a review of the "identical" issue already decided by that Court in conformity with TXO and Haslip.

Nothing in TXO alters the Haslip criteria already twice reviewed by the California courts regarding Nelson v Shell. TXO rejected the defendant's plea for a "heightened scrutiny" review (plurality opinion at p. 11) and concluded that a jury award which was upheld

by the trial judge and unanimously affirmed on appeal "is entitled to a strong presumption of validity [and] ... there are persuasive reasons for suggesting that the presumption should be irrebuttable ... or virtually so" assuming that fair procedures were followed. (Plurality opinion, p. 12)

In TXO this Court also noted that the West Virginia appellate opinion "was unanimous and gave careful attention to the relevant precedents, including our decision in Haslip..." (Plurality opinion, p. 20) Nelson clearly meets that test since Haslip was twice considered by two different California Courts of Appeal which, independently, unanimously found no Haslip violation, and the California Supreme Court twice denied review of Shell's petitions

without dissent. (Pet. App., p. 1a; Rspts.' App., p. 92A)

It is respectfully submitted that Shell's First Question is captious and does not merit further attention or delay by a retransfer to California Courts which have already resolved all of the issues arguably involved.

II

SHELL'S SECOND CONSTITUTIONAL QUESTION IS WITHOUT MERIT AND IS BASED ON SELF-SERVING CHARACTERIZATIONS WHICH IN TURN RELY ON FACTUAL ALTERATION

Shell's second constitutional proposition is that it was denied "substantive due process" because the punitive damage award was "fundamentally unfair." (Pet., Point II, p. 16) Shell asserts that the increase at the retrial was based on "essentially the same factual record."

(Shell's Question Presented, No. 2.)

While this and every retrial of necessity involves "essentially" the same facts as the first trial, Shell slides past the significant additional evidence adduced at the retrial: Nelson proved that the initial award of punitive damages had not motivated Shell to rescind or withdraw use of its infamous Base Lease Manual. Over three years later, at the September 1990 retrial (Rspts.' App., p. 47A), Nelson subpoenaed each and all documents Shell had created in the three year interval between trial number one and trial number two which evidenced any modification or withdrawal of the manual, or any part thereof. (Pet. App., p. 8a) No documents were produced and Shell's counsel eventually stipulated that no such documents

existed. (Ibid.)

On appeal Shell argued that the increased award could not be justified based on "use of the base lease manual subsequent to 1987..." (Rspts.' App., p. 84A) The Court of Appeal found that the "contention is without merit ... [because, in California] evidence of the defendant's continuing bad acts is relevant to the issue of malice." (Rspts.' App., pp. 84A-85A)

The fact that during the three-year interim between trials Shell had done nothing to rescind or modify the vicious, fraud-inducing Base Lease Manual was significant to the trial court: "Some effort following the first trial to withdraw or recall the base lease manuals would be reasonably expected if the first punitive damage award was seen as

anything beyond a mere nuisance." (Pet. App., p. 30a) After describing a few of the fraudulent techniques Shell taught its personnel to employ (Id.), the trial court continued: "By not rescinding such methods promptly and clearly Shell has at a minimum left the continued use of these manuals up to the individual choice of field personnel, many of whom were trained to follow these techniques. It is obvious that the first assessment of punitive damages has been insignificant considering that one [objective] ... is to deter future conduct of a similar nature...The sum of $4,600,000...is the minimal amount that will deter future conduct and fairly and justly punish outrageous and fraudulent conduct." (Id., p. 31a)

The essence of Shell's Point II is that the United States Constitution prohibits California from punishing it for failing to take steps to halt the fraudulent practices advocated in the Base Lease Manual. (Pet., pp. 16-20)

Shell's argument is particularly hollow considering this Court's holding in Haslip, supra, that there was no constitutional impediment to a substantial award of punitive damages (see 111 S.Ct. at p. 1037, note 2) based on defendant's failure to prevent its agent from committing a fraud. (See 111 S.Ct. at pp. 1040-1041)

This Court said:

> "Alabama's common-law rule is that a corporation is liable for both compensatory and punitive damages for fraud of its employee effected within the scope of his employment. We cannot say that this does not rationally advance the

> State's interest in minimizing fraud. Alabama long has applied this rule in the insurance context, for it has determined that an insurer is more likely to prevent an agent's fraud if given sufficient financial incentive to do so. [Citation]
>
> "Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a 'position to guard substantially against the evil to be prevented.' [Citation]" (111 S.Ct. at p. 1041) (Emphasis added.)

California law is less expansive than the Alabama law construed in Haslip since it does not permit holding a corporation responsible in punitive damages for acts of its agent, absent proof of authorization, ratification and the like. (See California Civ. C. Section 3294(b)) However, the two States are equally interested in "minimizing fraud,"

precisely the point the trial court made when it stated, "It is obvious that the first assessment of punitive damages has been insignificant considering that one of the purposes of punitive damages is to deter future conduct of a similar nature." (Pet. App., p. 31a) In Nelson, unlike Haslip, we are not dealing with renegade agents overstepping their authority. Here, Shell created the fraudulent techniques and urged that they be followed.

Yet, despite the punitive damage assessment, despite having its foul instruction manual exposed for all to see, and despite knowing the distressful effect its use wrought on an elderly family, Shell acted with callous indifference to the property owners with whom it deals, the public, its employees and

the judicial system. It did absolutely nothing to rescind or modify the manual or otherwise officially act to prevent the continuance of those business practices (Pet. App., p. 17a) which were found by the trial court to be "at the outer limits of intolerable business practice." (Pet. App., p. 31a)

The need to send Shell a meaningful message in light of this action, and its subsequent inaction, was apparent to the trial court:

> "Shell gave virtually nothing for the lease extensions, bore no risk, and stood to take $600,000 from the Nelsons. If merely one effort creates such a gain the enticement of profitability would be too tempting to resist. The potential for enormous profit must be dampened by meaningful penalty if caught." (Pet. App., p. 33a)

The California Court of Appeal agreed that the increase was appropriate and even necessary to finally "get

[Shell's] attention" to the need to put an end to its fraudulent techniques of doing business in California. (Pet. App., pp. 18a-19a) Shell had been using the techniques of the Base Lease Manual since 1960. (Respts. App., p.30A)

In TXO, this Court reaffirmed that in calculating punitive damages the trier of fact could consider the "magnitude of the potential harm that defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." (Plurality Opinion, pp. 15-16) (Emphasis in original.)

It is respectfully submitted that both TXO and Haslip demonstrate that the California Supreme Court and Appellate

Court were correct in finding that nothing in Shell's second "Question Presented" merits further delay in implementation of the California judgment.

III

SHELL'S THIRD POINT IS WITHOUT MERIT: THIS COURT HAS TWICE HELD THAT ATTORNEYS' FEES ARE CONSTITUTIONALLY PROPER TO CONSIDER IN ASSESSING PUNITIVE DAMAGES

Shell's effort to create a federal due process issue out of a "ratio" argument that assails consideration of attorney fees (Pet., p. 25) has been rejected in Haslip and TXO. In Haslip, supra, this Court held that one of the factors that the trier of fact could properly consider in determining the amount of punitive damages to award was "all the costs of litigation." (111 S.Ct.

at p. 1045) Similarly, in TXO, supra, the compensatory damages consisted of the costs of defending against defendant's declaratory judgment action, which is no different than the situation at bar.

While Shell's ratio argument deprecates the significance of Nelson's attorneys' fee expenditure of $268,000 to prevent a theft of $650,000 (Pet., p. 22), this Court realistically recognized that the expense of litigation is as real a financial loss to a victim of fraud as any other type of monetary damage.

Shell also fails to mention that the trial court reviewed the attorney fees incurred by Nelson and made an express finding that they were necessary and reasonably incurred. (See Rspts.' App., p. 69A, note 10 and text) In various types of cases, such as Nelson,

attorneys' fees are appropriately considered "as compensatory damages." (Rspts.' App., p. 69A) Thus, the Court of Appeal appropriately depicted the ratio here to be 17-1. (Pet. App., p. 19a) Shell does not assert that a 17-1 ratio violates due process of law.

IV

THIS COURT'S RETRANSFER ORDER IN THE AMERICAN NATIONAL BANK CASE DOES NOT SUPPORT A RETRANSFER OF NELSON

In a last-ditch effort to create the appearance of a justiciable issue, Shell attaches to H.C. Hanson v. American National Bank and Trust Co., supra, 844 S.W.2d 408, with limpet-like tenacity. (See Shell's petition at pp. 7, 8, 14, 15, 16, and 26) Because this Court vacated and remanded American National Bank (61 U.S.L.W. 3669), Shell purports

to discern much in common with it. However, American National Bank provides no justification to further extend this litigation marathon.[8]

Shell asserts that American National Bank is germane here because, Shell claims, this Court's retransfer order is addressed to the standard of review. (Petition, pp. 7-8, 14-15) We have demonstrated above that the California standard of review, as applied in Nelson

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[8] Respondent Charlotte Nelson was born December 3, 1907, and is 85 years of age. (Declaration of Charlotte Nelson, dated October 15, 1992, in support of her Motion for Preference in the California Court of Appeal.)

Even though Mrs. Nelson's Motion for Preference was granted, 16 months have elapsed since the judgment was entered on March 31, 1992.

The order which Shell seeks would result in yet another round of appellate litigation. This case would be retransferred to the California Court of Appeal. After the decision of that Court, Shell could again petition the California Supreme Court and then this Court.

by the California appellate courts, fully complies with Haslip and TXO. (Point CI2, supra) Furthermore, Kentucky has a "first blush rule" to determine if a punitive assessment was the product of passion and prejudice. (American National Bank, supra, 844 S.W.2d at 416) California's standard of review is more stringent. (Nelson III Opinion, Pet., p.17a)

Shell next claims that California's criteria for awarding punitive damages are less specific than the criteria "which this Court apparently viewed as potentially insufficient in American National Bank." (Petition, p. 15) We have demonstrated above that the trial court painstakingly applied the criteria approved by Haslip. (Point CI 1, supra)

Shell then states that Kentucky does not consider a defendant's wealth. (Petition, p. 15) This Court has, however, made it clear that considering a defendant's wealth does not present a constitutional issue. (TXO, supra, plurality opinion at p. 17, note 28; Haslip, supra, 111 S.Ct. at p. 1045)[9]

Additionally, Shell fails to mention that American National Bank differs from the case at bar in several other significant respects:

1. The petitioner in American National Bank claimed that the punitive damages award was equal to one-half of

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[9] Indeed, consider the financial havoc which could be wreaked if a defendant's net worth were not an indicium of consideration thus increasing the likelihood that triers of fact would assess punitive damages grossly disproportionate to a defendant's worth (as apparently happened in American National Bank).

its net worth and hence would destroy it. (American National Bank petition at pp. 21, 25-27.) (See footnote 9, supra.) No such claim has been made by Shell. (See Nelson III, Pet. App., p. 18a, note 2.)

2. American National Bank involves a judgment following a jury trial where the bank claimed that the jury was not instructed properly, thus prejudicing the bank. Nelson involves a court decision.

3. In the case at bar, there was no disagreement in the appellate courts. In American National Bank, on the other hand, the Kentucky appellate courts did disagree on the issue of whether the punitive damage award was excessive, the Court of Appeals reversing the trial court and the Supreme Court in turn reversing the Court of Appeals.

4. American National Bank has not involved the repeated reviews accorded defendant in the case at bar.

5. American National Bank involves a national bank, which uniquely presents federal issues of protecting the depositors and the like. The case at bar involves only California's repeatedly expressed interest in minimizing fraudulent business practices. (See, e.g., Cal. Penal Code Sections 532 and 182(4), providing for imprisonment for fraud; Cal. Civil Code sections 1695.7, 1695.8, 1812.217, 1812.218 and 2924h (g), providing for imprisonment or punitive damages for fraud; Cal. Civil Code Section 3294, providing for punitive damages for fraud.)

CONCLUSION

If Shell had shown similar interest in protecting the Nelsons' legal rights in 1978, it would not now be seeking relief from this Court.

Shell advocated fraud in its Base Lease Manual for some 27 years before it was publicly exposed by Nelson. It is time that the last chapter of this malevolent manual is finally written. Shell's petition should be denied.

Respectfully submitted,

G. Dana Hobart
Hobart & Heeringa
Donald Caffray

Attorneys for Respondents
Charlotte Nelson, et. al.

APPENDICES

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

B030269

(Super. Ct. No. C 552457)

SHELL OIL COMPANY,

Cross-Defendant and Appellant,

v.

EDWARD L. NELSON, CHARLOTTE LOUISE NELSON, SHARLEE LOU (NELSON) WELSH and MARY JO (NELSON) SETTLES,

Cross Complainants and Respondents.

[Filed May 24, 1989]

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur Baldonado, Judge. Affirmed in part and Reversed in part.

Keltner & Schreiber, Inc., Gregory C. Horn, and Edwin C. Schreiber for Cross-Defendant and Appellant.

Hobart & Herringa, and G. Dana Hobart, Donald B. Caffray, and Leonard Sacks for Cross-Complainants and Respondents.

Cross-defendant/appellant Shell Oil Company (Shell) appeals from the judgments [1] entered upon (1) special jury

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[1] The record on appeal reveals that the court erroneously entered two separate judgments, neither of which makes reference to or incorporates the other. As there can only be one judgment, we have joined these judgments, creating one which offers two alternative remedies. As discussed, infra, Nelson has now abandoned one of these remedies.

verdicts, finding Shell liable for concealment or suppression of a material fact and intentional misrepresentation of a material fact, awarding $154,150 compensatory damages and $235,600 punitive damages and valuing Shell's leasehold estate at $235,600; and (2) a court verdict, rescinding three five-year options to renew Shell's lease with cross-complainants/respondents Edward L. Nelson, et al. (Nelson)[2]/ and awarding $1.9 million punitive damages, less $5625 (rental overpayment by Shell to Nelson) and $7000 (value of Shell's leasehold for the time prior to that in which the

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[2] Cross-complainants and respondents are Charlotte Louise Nelson, widow of Edward L. Nelson, who died in June, 1979; and Sharlee Lou Welsh and Mary Jo Settles, children of Edward and Charlotte Nelson. All are trustees of the Nelson Trust, which owned the property in question.

option took effect).

UNDERLYING FACTS[3]/

Since 1942, a member of the Nelson family has owned the real property located at 5548 West Imperial Highway, the leasing of which has given rise to this appeal. Shell first leased this property from the parents of cross-complainant Edward Nelson in 1950 for operation as a Shell service station. Upon the property passing to Edward Nelson, Shell entered into a lease with Edward and Charlotte Nelson on March 16, 1960. The terms of this lease terminated upon completion of the reconstruction and modernization of the service station.

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[3] Consistent with long-established rules on appeal, these facts are related in the light most favorable to the judgment. (Walling v. Kimball (1941) 17 Cal.2d 364, 373.)

A second 15-year lease followed. It began on May 1, 1961 and ended May 31, 1976, and included a ten year option, commencing in 1976. Shell paid $1135 in rent, $328.40 of which was repayment of the reconstruction loan by Nelson to Shell and $806.66 of which was actual rent to Nelson. Were Shell to exercise the ten-year option, the monthly rent, as of 1976, would be $910. The lease included no provision allowing for a rent adjustment to respond to inflation and, among other things, included a 90-day termination clause in Shell's favor; a requirement that Nelson pay the property taxes up to $2400 per year; a requirement that Nelson pay for fire insurance; and the aforementioned 10-year option to be exercised 45 days before expiration of the lease.

In March, 1975, Dale A. Lewis (Lewis), a Shell real estate representative, was contacted by the California Department of Transportation (Caltrans) about construction of highway 105, now known as the Century Freeway.[4] Because of its plans to widen Sepulveda Boulevard and to construct the Century freeway, Caltrans purchased a parcel of real property located on Imperial Highway and Sepulveda, upon which Shell had a service station. Shell received $11,500 for the fixtures which remained on that property.

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[4] The Century Freeway became an active Caltrans project in 1958 or 1959. Construction of the freeway was enjoined in 1972 by the Federal Court, in the case of Keith v. Volpe (C.D.Cal. 1972) 352 F. Supp. 1324, which ordered California to reconsider the project. This injunction remained in effect until October, 1979, when it was lifted by a consent decree.

From December, 1975, through March, 1976, Lewis engaged in an unsuccessful attempt to negotiate three five-year options to the Nelson lease, due to expire on May 31, 1976. At this time, Lewis offered Nelson a $6000 bonus for these lease extensions. Nelson rejected this offer and countered with a proposal that Shell pay all property taxes and that the rent for any additional option years be based on the appraised value of the property at the time the options were exercised. Upon Lewis' recommendation, Shell abandoned these negotiations for the time being.

In April, 1976, Shell exercised the ten-year option to renew the Nelson lease, and, as provided in the lease, the monthly rental payments were to be decreased to $910. The remainder of the

lease terms remained the same.

In June, 1976, Shell failed to reduce the monthly rent and continued paying $1135 to Nelson. Shell continued to overpay Nelson $225 every month for over two years, resulting in overpayments totalling $5,625. Lewis was informed about Shell's overpayment by telephone on May 30, 1978 and by follow-up interoffice memorandum, dated May 31, 1978.

Lewis immediately telephoned Nelson to explain there had been an error in the rental payments and advise him of the overpayment. Nelson stated that it would be a hardship for him to repay the $5,625. Lewis met with Nelson at the Nelson apartment in Leisure World during the first week of June, 1978. Mr. Nelson, Mrs. Nelson, and Lewis were the only parties present during this

meeting.[5]/

After Mrs. Nelson greeted Lewis at the door, they chatted about Mr. Nelson's failing health. Mr. Nelson had been to the emergency room once that week and to his doctor's office. Hospital records revealed that on June 2, 1978, Mr. Nelson had suffered "dizziness and chest pain." Mr. Nelson's physician's records indicated that between May 24 and June 22, Mr. Nelson had lost approximately 11 pounds. The week Lewis met with the Nelsons, Mr. Nelson had been having trouble with his heart and losing weight rapidly. On June 8, 1978, Mr. Nelson

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[5] According to Lewis, a fourth person, identified as the Nelson attorney, was also present; however, this assertion was not reflected in Lewis' notes about the meeting.

argument, Nelson informs us that he now elects the remedy of rescission and, consequently, will not pursue a new trial on the issue of damages as to the remedy which was tried to the jury. That being the case, Shell's contentions of error as to the jury verdicts have become moot. We focus this opinion on Shell's assertions of error as to the court's action granting recision of the three five-year options.

Shell contends that the judgment granting rescission was erroneous because (1) substantial evidence is lacking to support the finding of fraud or undue influence because (a) the Statute of Limitations bars this remedy, and (b) the Summary Order found that Mrs. Nelson had sufficient capacity to execute the agreement; (2) the court allowed

admission of the Base Lease Manual without the proper foundation having been laid; (3) the court abused its discretion when it denied Shell's motion for mistrial, based upon Nelson's reference to settlement negotiations in contravention of the court's order; and (4) the court's punitive damages award was improper because (a) the options were totally executory at the time of the taking, consequently, there were no actual damages suffered by the Nelsons, (b) even if the court had jurisdiction to award punitive damages, it cannot award an amount different from that designated by the jury, and (c) there was no evidence of ratification of the alleged fraudulent act by an officer, director or managing agent of Shell.

1. Substantial Evidence.

(a) Statute of Limitations. Shell argues that the court based its decision to rescind on fraud and undue influence. Citing Code of Civil Procedure section 337, subdivision 3, Shell asserts that a cause of action for rescission based upon undue influence is barred by the Statute of Limitations which it pleaded as an affirmative defense.[10]/ Contending that the last act of undue influence could have occurred no later than the signing of the option agreement (June 8, 1978),

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[10] Code of Civil Procedure section 337, subdivision 3 sets forth a four-year limitation period. In pertinent part, it provides: "[Where an action is brought to rescind a contract in writing,] [t]he time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

Shell avers that Nelson was required to file his action for rescission by June 8, 1982. Shell continues that even if it were to accept the fact that Mr. Nelson was incompetent at the time of the signing, he died on June 10, 1979, and Mrs. Nelson or the remaining family members were required to file an action for rescission by June 10, 1983.

This argument fails because Shell completely ignores the fact that the court's decision was not based on undue influence alone but on fraud as well. The evidence presented at trial and summarized above and in the court's order (Appendix B) clearly provides the requisite substantial evidence to support a finding that Shell engaged in fraud when it pressured the Nelsons to sign the option agreement. (Crawford v. Southern

Pacific Co. (1935) 3 Cal.2d 427, 429.)

(b) Mrs. Nelson's competency. Shell contends that since the Summary Order found that Mrs. Nelson had sufficient capacity to execute the option, her signature alone is sufficient to validate the option even if Mr. Nelson lacked capacity. This assertion is meritless because it is irrelevant. As noted above, the rescission was grounded on Shell's fraudulent actions. The extent of Mrs. Nelson's capacity is of little, if any, consequence to the finding of fraud on the part of Shell.

2. The Base Lease Manual. Shell asserts that the court allowed admission of the Base Lease Manual without the proper foundation having been laid, i.e. evidence that this manual set forth the habit or custom of Shell. Shell contends

that without such a showing, this manual was irrelevant. In addition, Shell argues that its witnesses denied using them.

Shell disregards the testimony of Ted J. Moriarity and Robert S. Drager. Mr. Moriarity was a Shell employee for 25 years, approximately 14 of which as a real estate representative. He testified that he was instructed to follow the guidelines set forth in the Base Lease Manual when negotiating service station leases and that this was one of the manuals used by real estate representatives.

Mr. Drager, at the time of trial, was Shell's district Real Estate Representative. His deposition testimony, which was read at trial to impeach his trial testimony, revealed that he was

provided a copy of the Base Lease Manual at his training seminar; was told that it was to be used as a guideline for his work as a real estate representative; and, in fact, did use the Base Lease Manual as a guideline when he was involved in the negotiation of service station leases.

The Base Lease Manual is relevant to a number of issues. Since it had been used in substantially the same form since 1960, it established that many years ago Shell instituted the methods outlined therein to secure leases advantageous to it. The Base Lease Manual instructions establish Shell's authorization and ratification of the practices promoted in the Manual.

3. Motion for Mistrial. Shell's motion for mistrial was prompted by a

question posed by Nelson's counsel to Mr. Drager, Shell's District Real Representative. It followed a series of questions about $5446 the State had paid to Shell for Shell's personal property, remaining on the Nelson property. The question was: "Mr. Drager, Shell had been pressing a claim to the Nelsons by communication that they [sic] thought that their [sic] improvements were worth $44,000. They [sic] ended up settling for or taking from the State $5400. [Par.] Did you, at all times know that, when you were pressing the $44,000 figure, that it wasn't what you considered to be the true value of the property?" Before Mr. Drager could respond, Shell objected, citing Evidence

Code section 1152.[11]/

The court declared a recess and, out of the presence of the jury, heard argument about whether Shell's acceptance of the $5446 was the result of a negotiated settlement. Unable to determine whether the pertinent stipulation was a settlement, the court precluded the testimony on the ground that it was irrelevant because the stipulation to accept $5446 occurred in June, 1986, which was eight years subsequent to the alleged misconduct which was the subject of this

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[11] In pertinent part, Evidence Code section 1152 provides: "(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it."

trial. When the jury returned, the court instructed it as follows: "You are instructed to disregard [the following]. [Par.] ... there was some mention in Mr. Drager's testimony about some $5000 of various personal property items and an agreement that was entered into in front of another judge much earlier in this case, and to the extent that any of that sounded like a settlement of any issue in this case, you're to disregard it. [Par.] And we're not going to go into that agreement or issue again because it's not before us and it is not to affect your deliberations in this case on any issue."

Whether or not to grant a motion for mistrial is within the discretion of the trial court, and its determination will not be disturbed on appeal unless the

court has manifestly abused its discretion. (Richardson v. Employers Liab. Assur. Corp. (1972) 25 Cal.App.3d 232, 244, disapproved on other grounds in Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.App.3d 566.)

The gist of Shell's objection is that this one question, standing alone, painted Shell in the image of a greedy bully. We cannot agree. Without repeating all the evidence previously summarized, we find that the jury heard other substantial evidence which painted that picture much more effectively. This other evidence coupled with the court's admonition to the jury to disregard counsel's query about the stipulation lead us to conclude that the court did not abuse its discretion when it denied Shell's motion for mistrial.

4. The Punitive Damages. As noted above, the court awarded Nelson $1,900,000 (less approximately $12,000) in punitive damages. Shell asserts that this award must be reversed because Civil Code section 3294 precludes an award of exemplary or punitive damages in a suit based upon a contract cause of action.[12]/ In any event, citing Esparza v. Specht (1976) 55 Cal.App.3d 1, Shell argues that since there were no actual damages awarded or suffered, the punitive damages award must fall.

Shell's first theory is unpersuasive

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[12] In pertinent part, Civil Code Section 3294 provides: "(a) In an action for breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

because it has long been recognized that an action for rescission based upon a fraudulent inducement to enter into an agreement does not arise from contract, and allowance of exemplary damages is, therefore, proper. (Mahon v. Berg (1968) 267 Cal.App.2d 588, 589-90.)

Shell's second theory requires a more complete discussion. Shell asserts that Nelson suffered no actual damages because the options were completely executory in nature; the time had not arrived, nor would it ever given the State condemnation, for Shell to exercise these options. Nelson counters that for all practical purposes, Shell exercised these options when it grounded its claim for the lion's share of the condemnation award upon its right, pursuant to these fraudulently obtained options, to lease

the Nelson property until 2001. However, Nelson's counter argument sidesteps Shell's assertion that Nelson suffered no actual damages.

We recognize that under certain circumstances punitive damages may be awarded without a verdict expressly providing recovery of compensatory damages. These cases, however, have involved situations where (1) actual damages are presumed as a matter of law, e.g., defamation per se (Clark v. McClurg (1932) 215 Cal. 279); or (2) the evidence establishes an actionable wrong committed by defendant and resulting damages. (See e.g., Wayte v. Rollins International Inc. (1985) 169 Cal.App.3d 1; Commercial Cotton Co. v. United California Bank (1985) 163 Cal.App.3d 511; Werschkull v. United California Bank (1978) 85

Cal.App.3d 981; Weiss v. Blumencranc (1976) 61 Cal.App.3d 536.)[13]/ The facts of the case at the bench do not place it in either category. Despite the dissenting opinion's discussion as to how the Nelsons would have suffered actual damages had certain contingencies occurred, in fact these contingencies did not materialize, and no actual damages were suffered.

The options have been rescinded, and Nelson is now entitled to the full amount paid by the State for the property in question. "It is well settled in California that punitive damages cannot be awarded unless actual damages are

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[13] We further note that the latter category of cases involves a special relationship. In the instant case, a fact found not to be in substantial controversy was that Shell did not stand in any fiduciary relationship to the Nelsons. (Footnote 9, supra.)

suffered (Mother Cobb's Chicken T., Inc. v. Fox [1937] 10 Cal.2d 203, 206)." (Esparza v. Specht, supra, 55 Cal.App.3d at p. 6.)

Having so determined, we need not discuss Shell's remaining arguments challenging the validity of the punitive damages award.

DISPOSITION

The judgment of rescission is affirmed to the extent that rescission was granted but reversed to the extent that punitive damages were awarded.

Each party to bear its own costs.

NOT FOR PUBLICATION IN THE OFFICIAL REPORTS

GOERTZEN, J.

I concur:

GEORGE, J.

McCLOSKY, J., Concurring and Dissenting.

I concur in that part of the opinion affirming the judgment of rescission but I dissent from that part of it reversing the award of punitive damages.

The majority bases its reversal of the punitive damages award on the supposed lack of actual damages. It does correctly point out that "[i]t is well settled in California that punitive damages cannot be awarded unless actual damages are suffered (Mother Cobb's Chicken T., Inc. v. Fox [1937] 10 Cal.2d 203, 206)." (Esparza v. Specht, supra, 55 Cal.App.3d at p. 6.)

"If actual damages are alleged and proved, [however,] a separate award of compensatory damages is not a necessary foundation for an award of punitive damages." (6 Witkin, Summary of Cal. Law

(9th ed. 1988) Torts, Sect. 1371, p. 837.) In this case at bench, it is true that no award was made for the actual damages on which the punitive damages were based, but it is clear beyond doubt, as was proven at trial, that the Nelsons suffered actual damages by Shell's claiming in the condemnation its supposed right to $620,000 of the condemnation award because the 1978 extension exacted from the Nelsons entitled it to two-thirds of the condemnation award. Had Shell been successful in that claim this would have had the effect of lowering the part of trial award to which the Nelsons were entitled. In fact, at trial, Shell's expert witness testified that the value of Shell's leasehold interest was $620,000, based upon his professional opinion that the fair rental value of the

Nelsons' property was $7,900 per month, a sum almost $7,000 per month higher than the rent called for by the options. This low rent 15-year extension, it should be remembered, was exacted from the Nelsons on penalty of their having to immediately repay Shell the $5,625 overpayment if the Nelsons did not agree to the low rent extension. This $5,625 was an amount of money the Nelsons did not have and would have had to borrow, thus reducing their net income had they not agreed. This was yet another actual damage suffered by the Nelsons at a time ten and one-half years before the expiration date of the lease and continuing for some time thereafter.

McCLOSKY, Acting P. J.

III

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

B055153

(Super. Ct. No. C 552457)

EDWARD L. NELSON,

Cross-Complainant and Respondent,

v.

SHELL OIL COMPANY,

Cross-Defendant and Appellant.

[Filed October 21, 1991]

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur Baldonado, Judge. Modified and Affirmed in part. Reversed in part, Affirmed in part, and Remanded.

Schreiber & Horn, Gregory C. Horn, Edwin C. Schreiber and Mark Schreiber for Cross-Defendant and Appellant.

Hobart & Herringa, Kent Heeringa, Donald B. Caffray and G. Dana Hobart for Cross-Complainant and Respondent.

Cross-defendants/appellants Shell Oil Company, etc., et al., (collectively as Shell) appeal from the judgment awarding cross-complainants/respondents Edward L. Nelson, etc., et al., (collectively as the Nelson Trust) $352,242 in actual damages and $6.295 million in punitive damages.

For the reasons discussed below, we reverse and remand the judgment in part and modify and affirm in part.

FACTS AND PROCEDURAL BACKGROUND

On May 24, 1989, we affirmed a judgment against Shell, which judgment granted rescission, based upon fraud, of three five-year options to lease property owned by the Nelson Trust. In that earlier appeal, however, we also reversed the approximately $1.9 million punitive damages award, finding that it was not

sustainable as no actual damages, as to the rescission, had been proven or awarded.[1/]

The parties returned to superior court, where, upon motion by the Nelson Trust, the court granted a new trial on "the Rescission Cause of Action as to compensatory damages and punitive damages." Shell petitioned this court for a writ of mandate/prohibition, asking

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[1] In brief, the evidence supported the court's finding that Shell, via its real estate representatives who acted upon the offensively manipulative advice printed in Shell's base lease manual, had fraudulently acquired the three five-year options on the Nelson Trust property, knowing that Caltrans' Century Freeway project would require eminent domain acquisition of this property. This occurred when the late Edward Nelson was 80 years old and in severe ill health. When Caltrans filed its eminent domain action, Shell claimed the lion's share of the award, and the Nelson Trust cross-complained seeking, among other things, the rescission of the three five-year options.

us to reverse the new trial order. We denied the petition "for absence of facts showing entitlement to extraordinary relief." Shell then filed a notice of appeal, challenging the court's order granting a new trial. We dismissed the appeal as being from a nonappealable order.

The trial commenced on September 25, 1990. The case was tried to Judge Baldonado, sitting without a jury, both sides having agreed that the retrial applied only to the equitable "side of the case." Before the taking of evidence, the parties argued several motions. Shell moved to dismiss, asserting that our earlier opinion was dispositive of all the issues. The court denied Shell's motion. The Nelson Trust moved to amend its cross-complaint to add a cause of

action for slander of title/quiet title. The Nelson Trust also moved the court to take judicial notice of the transcript of the original trial. Shell objected to both motions. The court reserved ruling on the Nelson Trust's motions, in part, to allow Shell time to file written opposition to the motion to amend.

On this appeal, Shell contends that the trial court erred in awarding general and punitive damages to the Nelson Trust at the conclusion of the new trial.

The Nelson Trust Case.[2]/

Robert Drager, current Shell real estate manager and Shell real estate representative during the previous trial, was called as an adverse witness. (Evid.

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[2] We set forth the facts with more particularity than usual to facilitate discussion of Shell's assertion that there is no admissible evidence to support the damage awards at issue.

Code, Sect. 776.) He testified that he had not prepared nor did he know of any document prepared by Shell which modified or discussed the base lease manual since 1987.[3]/ On cross-examination, Mr. Drager stated that he had not seen a base lease manual since 1987; his duties included training younger people in the real estate department and that he had not directed any trainee to the base lease manual; as far as he knew, no copies of the base lease manual were available in the Shell real estate office.

Keith Settles, spouse of Nelson Trust trustee Mary Jo Nelson Settles, testified that he acted as an "unpaid informal advisor" to the Nelson Trust and

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[3] Shell objected to this line of questioning, arguing that it was irrelevant because conduct subsequent to the previous trial had nothing to do with the rescission of the lease extensions.

had participated in the Nelson Trust income tax return preparation since 1987. He keeps the records on the Nelson Trust real estate transactions, prepares mortgage payments and the homeowners' association checks for his wife's signature and makes rent deposits. In December 1986, when $345,000 of the eminent domain funds were released to the Nelson Trust, he was involved in investment strategy decisions made by the Nelson Trust. At that time, the Nelson Trust purchased three condominium units and invested about $242,000 in a California tax-free municipal bond account (the Nuveen account). In May 1990, when the Nelson Trust received an additional $169,688 from the state, $165,000 was invested in the Nuveen account and about $4,000 was deposited in

the checking account for the condominium properties. He opined that had the $624,553 (hereinafter referred to as $624,000), released by the state in November of 1986 and placed in a blocked account, [4]/ been received by the Nelson Trust, it would have been used to purchase more real property and to invest in tax-free municipal bonds or money market funds in order to preclude greater income tax liability. He stated that the condominium properties were purchased because income generated by these properties was less than their expenses plus depreciation, resulting in no tax liability.

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[4]. By stipulation of the parties, the state released $624,553.78, representing the condemnation proceeds in dispute, to the Nelson Trust and Shell jointly to be deposited in an interest-bearing account to be selected by the Nelson Trust and Shell.

On cross-examination, Mr. Settles testified that he had never been a trustee of the Nelson Trust; the Nelson Trust did not pay federal or state taxes on income generated by the Nuveen account; without considering property taxes, maintenance costs, and other expenses, the condominium units' negative cash flow totalled about $500 per month; and although his memory was "hazy," he believed the Nelson Trust trustees had consented to the $624,000 being placed in the blocked account.

Mary Jo Settles testified that she was a trustee of the Nelson Trust; Keith Settles' testimony about his advisory role to the Nelson Trust was correct; and the investments Keith Settles described were accurate.

Darlene Huber has been a tax preparer since 1971 and prepared the tax returns for the Nelson Trust. She is very familiar with the Nelson Trust's investments in real estate and tax-free bonds; the Nelson Trust paid no taxes in 1987, 1988, and 1989 because the income was offset either by depreciation or negative cash flow. She opined that had the Nelson Trust received $624,000 in 1986 for investment in 1987, the same investment strategy would have been followed, and the Nelson Trust would have incurred no tax liability for 1987, 1988, 1989, and the first quarter of 1990.[5]/ On cross-examination, Ms. Huber testified that her zero-tax-liability projection depended upon the type of real property

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[5] Shell's objection to this opinion as speculation was overruled.

acquired, how much was paid for it, and the amount of rents it generated. She admitted she did not know what the Nelson Trust would have bought or what rents it would have received because it was "all speculation." Ms. Huber further testified that if the Nelson Trust condominium units were sold at a profit, capital gains taxes would be owed; the money placed in the Nelson Nuveen account could be deposited and withdrawn at will; she knew of no reason why the $624,000 placed in the blocked account was not invested in the Nuveen account. On redirect, Ms. Huber reiterated her opinion that had the Nelson Trust received $624,000 at the end of 1986 and invested it 50/50 in condominiums (with the same negative cash flow as the other Nelson Trust condominiums) and in the Nuveen account,

it would have had no tax liability for 1987, 1988, 1989, and the first quarter of 1990.[6]/

Lastly, G. Dana Hobart, counsel for the Nelson Trust, testified that the Nelson Trust had paid a combined total of $281,208 in attorney fees to his firm for defense in the condemnation action and for prosecution of the fraud/rescission suit. He also testified that the Nelson Trust had paid $61,341 in costs, excluding costs of the previous appeal.[7]/ Mr. Hobart further testified that $4,050

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[6]. Shell's objection to this question as calling for speculation was overruled.

[7]. Shell objected to introduction of this evidence, asserting that attorney fees were not recoverable in an action based on contract and that costs were a matter subject to a post-trial proceeding, not part of damages. This objection was overruled without prejudice to renewing.

in attorney fees was paid to an attorney specializing in condemnation.

As to the interest earned by the blocked account, Mr. Hobart testified that $400,000 had been invested in treasury bills and $224,000 in a short-term certificate of deposit, and $20,869 interest had been earned. He asserted that the Nelson Trust suffered a $6,210 loss in earned interest, which represented the difference between the interest actually earned and the "state mandated 7 percent rate of interest under the California Constitution."[8]/

Asserting that had the $624,000 in the blocked account been available to the Nelson Trust and invested so as to preclude tax liability, Mr. Hobart

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[8] Upon objection by Shell, the court labeled this testimony argument.

testified that for 1990, 1989, and 1988, the Nelson Trust suffered a loss totaling $9,132.42 in federal income taxes, $1,054 in state income taxes, and $175 in tax preparation fees.

Mr. Hobart offered into evidence Shell's 1989 annual statement; the October 10, 1986, court minute order ordering release of approximately $624,000 by the state; and a copy of the lease between Shell and the Nelson Trust recorded on June 22, 1978. He stated that his firm had expended in excess of 2,500 hours on this case and had received partial payment pursuant to their contingent fee agreement.

As to the investment of the blocked account funds, Mr. Hobart testified that $400,000 was invested in a treasury bill account with Merrill Lynch, and $224,000

was placed in a certificate of deposit account with Los Angeles Bank; the account was under the joint control of the two firms representing Shell and the Nelson Trust. He testified that the agreement allowing dispersal of the $624,000 was "coerced and was tantamount to an imposed stipulation" because without it, the state would have held the money until resolution of the litigation between the Nelson Trust and Shell. He opined that if the Nelson Trust had been able to place these funds in a long-term municipal bond account or a long-term investment, the interest would have been higher than that earned.

On cross-examination, Mr. Hobart testified that he selected the institutions in which the money was deposited; he never asked anyone at

Shell's attorney's office if the funds could be placed in a tax-free municipal fund; the motivation for agreeing to the release stipulation was to have the funds accessible; in early 1986, the Nelson Trust had applied to withdraw the balance of the condemnation proceeds, and Shell and the state objected; consequently, the only way to get any part of the $624,000 was to accept the stipulation.

The Shell Defense.

Gregory Horn, counsel for Shell, testified that around November 1986, he entered into an agreement with Mr. Hobart regarding the use of the soon-to-be-released $624,000 condemnation proceeds; he told Mr. Hobart the funds could be placed in accounts which Mr. Hobart "deemed fit" and that he only wanted to be kept informed and have the right to

sign on the accounts; he had no recollection of discussing investment of the funds with Mr. Hobart prior to the funds' placement in the two accounts; he received copies of letters indicating where the money had been deposited after the fact of the deposit and never objected to any investment decision.

On cross-examination, Mr. Horn testified that when he learned that $400,000 had been placed in a three-month treasury bill account, he did not consider telephoning Mr. Hobart to request that the funds be placed in a higher interest-bearing account upon termination of the three months; he had "ultimate faith" in Mr. Hobart's ability to choose the financial institution.

The Court's Rulings.

On October 5, 1990, the parties

returned to court to argue their respective positions on the reserved motions. The reserved motions included Shell's motion to exclude evidence of acts subsequent to the securing of the lease extensions; the Nelson Trust's request for judicial notice of certain testimony in the prior trial, the trial court's earlier opinion, and the court of appeal opinion; the Nelson Trust's motion to amend the cross-complaint; Shell's motion to strike all exhibits; and Shell's motion for a directed verdict. The last motion was summarily denied. After extensive argument, the court took the remaining matters under submission.

On October 11, 1990, the court filed its statement of decision, a copy of which is attached to this opinion as an appendix.

Shell's subsequent motion for new trial was denied.

On October 26, 1990, judgment was entered. This timely appeal followed.

DISCUSSION

Shell asserts that the court erred when it granted a new trial on the issue of damages; when it awarded actual damages; when it granted the Nelson Trust's motion to take judicial notice; and when it granted the Nelson Trust's motion to amend its cross-complaint. Shell also challenges the punitive damage award. We shall address each contention of error in the order raised.

(1) The New Trial. As noted above, when we affirmed the earlier judgment of rescission we "reversed to the extent that punitive damages were awarded." Each party seized upon this language to

argue its respective position.

Generally, an unqualified reversal without directions remands the case for further trial. (Stromer v. Browning (1968) 268 Cal.App.2d 513, 518-519.) "The fact that the rule ... is a general rule implies that is has limitations. One limitation is that a case is to be set at large for retrial only when that is the intent of the appellate court. Judgment reversed at the end of an opinion is, of course, strong indication of such intent." (McCoy v. Hearst Corp. (1991) 227 Cal.App.3d 1657, 1662, quoting Stromer, supra, internal quotation marks omitted.) In our earlier opinion, we ordered that the judgment was "reversed to the extent that punitive damages were awarded." Of course, only we are in a position to state unequivocally what we

intended by that language. We do so now. We intended to authorize a new trial on the issue of damages. Given the history of this case and the fact that the jury hearing the legal cause of action found and awarded actual damages, we concluded that equitable considerations mandated that the Nelson Trust be given the opportunity to present evidence of compensatory damages related to the rescission cause of action. The general rule calling for a retrial applies. (Erlin v. National Union Fire Ins. Co. (1936) 7 Cal.2d 547.)

In Erlin, supra, the Supreme Court noted that in its first opinion (Erlin v. National Union Fire Ins. Co. (1933) 217 Cal. 374), it had held that "there [was] no evidence in the record sufficient to support" plaintiff's allegations, and

that therefore, "on the merits, the plaintiff [was] not entitled to recover." (Erlin v. National Union Fire Ins. Co., supra, 217 Cal. at p. 377.) In authorizing a retrial, the Supreme Court explained, in Erlin II: "The statement by this court in its opinion upon the former appeal that 'on the merits the plaintiff is not entitled to recover' could only refer to evidence then before the court. The reversal of the judgment was unqualified, that is to say, without direction to the trial court. Such a reversal remands the case for a new trial and places the parties in the same position as if the case had never been tried. [Citations.]" (Erlin v. National Union Fire Ins. Co., supra, 7 Cal.2d at pp. 548-549.)

This case is indistinguishable from the situation presented in Erlin II. We intended to authorize a new trial on the issue of damages. Therefore, the trial court did not err when it granted the new trial as to compensatory and punitive damages.

(2) Compensatory Damages. Shell challenges either the legal or evidentiary sufficiency of each of the items of compensatory damages awarded. There is merit in some, but not all, of Shell's assertions.

Preliminarily, we note that when a contract (here, a lease extension) is rescinded because of fraud, the defrauded party is entitled not only to the consideration with which he or she has parted, but also may be reimbursed for "any other special damage to which he [or

she] has been subjected" by the other's fraud. (Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal.3d 304, 315, emphasis in original.) The fundamental principle underlying full compensatory awards in rescission suits is that "'in such actions the court should do complete equity between the parties' and to that end 'may grant any monetary relief necessary' to do so. [Citation.] It is the purpose of rescission 'to restore both parties to their former position as far as possible.' [Citations.]" (Id., at p. 316.)

a. Attorney's Fees. In an action for rescission based upon fraud, a plaintiff is entitled, among other things, to compensation for consequential damages, including attorney's fees. (Kass v. Weber (1968) 261 Cal.App.2d 417,

423.) Clearly, were it not for Shell's fraudulent acquisition of the lease extensions and its related action claiming a large percentage of the eminent domain proceeds, the Nelson Trust would not have been required to defend against the Shell claim and would not have incurred the related attorney's fees.

In addition, as found by the court, some of the attorney's fees paid by the Nelson Trust were incurred because it was required to litigate with the State to ensure that the State would not release funds to Shell. The court heard evidence and took judicial notice of court documents which indicated that Shell had petitioned the State to release $479,000 of the $624,000 eminent domain funds

remaining to be disbursed.[9]/ The court rightly concluded that but for Shell's fraud, the Nelson Trust's litigation with the State would have ended on October 10, 1986. (Appendix, p. 6.) Under the "tort of another" theory, the Nelson Trust was entitled to recover these attorney's fees as compensatory damages.[10]/ (Glass v. Gulf Oil Corp. (1970) 12 Cal.App.3d 412, 437-438.)

b. Costs. The court awarded $60,000 in costs of litigation as item of damages, finding this expenditure was necessary and reasonable. (Appendix, p. 7.) Shell correctly contends inclusion

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[9] This occurred prior to the stipulation between the parties which allowed for the dispersal of $624,000 to both the Nelson Trust and Shell.

[10] The court ruled that this assessment of reasonable attorney fees did not allow any additional contingent fee factor. (Appendix, p. 7.)

of these costs in a compensatory damages award is erroneous.

The cases cited by respondent, to wit, Prentice v. North Amer. Title Guar. Corp. (1963) 59 Cal.2d 618, 620, Kass v. Weber, supra, 261 Cal.App. 2d at page 423 and Appel v. Burman (1984) 159 Cal.App.3d 1209, 1216, speak to the recoverability of attorney's fees as an item of damages; they do not provide that costs are similarly recoverable.

As there was no fiduciary relationship between the Nelson Trust and Shell,[11]/ Civil Code section 3343 sets forth the damages recoverable in this action. (Brown v. Critchfield (1980) 100 Cal.App.3d 858, 871.) This section does not include costs of litigation as part

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[11] This fact was found to be without substantial controversy prior to the initial trial in this matter.

of recoverable damages.

c. Loss of Use. The court awarded the Nelson Trust the difference between the interest paid on the funds in the blocked account and interest at seven percent, citing California Constitution, article 20, section 22. (Appendix, p. 18.) This article and section of our Constitution, however, deal with liquor control. The cases cited to the court below and to us quote language in the California Constitution, since 1976, found at article 15, section 1.[12]/ These cases continue their viability and relate now to article 15, section 1.

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[12] In pertinent part, article 15, section 1 of the California Constitution provides: "The rate of interest upon the loan or forbearance of any money, goods, or things in action, or on accounts after demand, shall be 7 percent per annum...."

The court properly awarded the Nelson Trust the difference between the interest paid on the $624,000 in the blocked account and seven percent. (McConnell v. Pacific Mutual Life Ins. Co. (1962) 205 Cal.App.2d 469, 481; Civ. Code, Sect. 3343, subd. (a) (2).)

Shell objects, arguing that the Nelson Trust should be estopped from asserting it suffered damages when the funds were placed in the blocked account because it voluntarily agreed to the stipulation releasing these funds. In its Statement of Decision, the court specifically found that the Nelson Trust's claim for these damages was not inconsistent with its entering into the stipulation. Whether the Nelson Trust voluntarily entered into the stipulation is a question of fact within the purview

of the trier of fact. The evidence presented, summarized supra, supports the court's conclusion that the Nelson Trust was required to enter into the stipulation to acquire access to the funds and to remove the State as a party to the litigation, as well as the inferred finding that the Nelson Trust did not voluntarily enter into the stipulation. (Appendix, p. 6-7.)

d. Income Taxes and Penalties. The court awarded a total of $10,060 in income taxes paid by the blocked account, a $126 tax penalty, and a $175 tax preparation fee. (Appendix, p. 9-10.) Shell asserts that the amount representing the income taxes paid and the penalty assessment was awarded in error. We agree.

The pertinent evidence adduced at trial was offered by Ms. Huber, the income tax preparer for the Nelson Trust, and Mr. Settles, the unofficial adviser to the Nelson Trust. Ms. Huber testified that in her opinion the Nelson Trust would not have paid any taxes during 1987, 1988, 1989, and the first quarter of 1990 if the $624,000 had been released to it and not placed in a blocked account. This opinion was based on speculation. Evidence that is purely speculative in nature is insufficient to support an award of damages.

Mr. Settles' opinion regarding the type of investments that would have been made by the Nelson Trust was equally speculative in nature.

As the evidence presented by Ms. Huber and Mr. Settles was based on

speculation, it is insufficient to support the award of $10,186 for income taxes paid and the tax penalty. (Frustuck v. City of Fairfax (1963) 212 Cal.App.2d 345, 367-368.)

(3) Judicial Notice. The Nelson Trust requested that the court take judicial notice of certain documents and testimony admitted in the prior fraud and rescission trial. Shell objects to the granting of the Nelson Trust's request to take judicial notice because the items judicially noticed are hearsay.

Certainly, no hearsay exception was available to allow the introduction of transcripts of prior testimony. Nor could the trial court take "judicial notice" of such testimony. Without the consent of both parties, the trial court cannot, on a retrial base its

determinations on testimony introduced at an earlier proceeding. (Hall v. Superior Court (1955) 45 Cal.2d 377, 381; Tulare Dist. v. Lindsay-Strathmore Dist. (1935) 3 Cal.2d 489, 579.)

However, any error in taking "judicial notice" of prior testimony was harmless. Both the jury and the trial court had expressly found that Shell was guilty of fraudulent conduct, and both had awarded punitive damages to the Nelson Trust. Although punitive damages were reversed on appeal, that reversal was based solely on the lack of evidence of general damages to support the award. The underlying finding of Shell's despicability was manifest in the record. The fact of fraud is res judicata, and there was no need to introduce evidence of it at the second trial.

As to the five documents relating to the parties' respective applications for withdrawal of the disputed eminent domain funds, judicial notice of these documents to support the fact that these applications had been made was proper. (Evid. Code, §§ 452, subd. (d) and 454.)

Those findings of fact, the res judicata effect of the first appellate decision and the evidence properly admitted at the second trial, support the award of general damages.

(4) Quiet Title Amendment. At the beginning of the trial, the Nelson Trust moved to amend its second amended cross-complaint to conform to proof to include an action to quiet title. After taking the matter under submission, the court ultimately granted the motion, finding that Shell had had ample notice and that

all the issues related to rescission, cloud on title and quiet title were fully litigated in the first trial. (Appendix, p. 3.) Shell avers that the court abused its discretion, because the Nelson Trust presented no excuse for making a motion to amend after five years and an entire trial had taken place.

We need not decide whether the court abused its discretion when it permitted this amendment, because any prejudice suffered by Shell was harmless. The primary reason Shell objects to the amendment is that it believes the only ground upon which to sustain inclusion of attorney fees in compensatory damages is through a quiet title action. As we have determined that the attorney's fees award was proper absent the quiet title action, any error committed was harmless.

(5) Punitive Damages. Lastly, on a variety of grounds Shell challenges the propriety of the court's award of punitive damages. Given our earlier conclusions, we need only address the following assertions by Shell: that the court was bound by the amount of the jury's award of punitive damages ($235,000) and that the increase to $1.9 million was erroneous; that in later increasing its award from $1.9 million to $6.295 million, the court was punishing Shell for taking a successful appeal; that the second increase in punitive damages was based on improperly admitted evidence; that Shell did not ratify the fraudulent conduct upon which the rescission was based; and that the award of punitive damages is unconstitutional without application of objective

standards.

a. The court was not bound by the jury's award of punitive damages, because the jury's actions became moot when the Nelson Trust elected the remedy of rescission. At the hearing on the issue of punitive damages after the first trial, the Nelsons cited numerous cases to the trial court for the proposition that punitive damages could properly be awarded in a rescission action, and both sides argued at length concerning whether the evidence of fraud did or did not support a punitive damage award. Shell's only objection on the issue of punitive damages was that no general damages existed in the rescission action to support them.

Thereafter, the trial court awarded punitive damages in the sum of $1.9

million, less $5,625 in rental overpayment and less $7,000 representing the value of Shell's leasehold estate, for a net award of $1,887,375.

Appellant's contention that this award was erroneous, first raised in the prior appeal, is asserted again in this appeal. We did not address this issue in the prior appeal; we concluded that punitive damages could not be sustained, since no general damages had been proven in the first trial, and the matter was remanded. We now address this argument for the first time.

Punitive damages may properly be awarded in an equity action where the right to rescind a contract is based on fraud. "The law is clear that punitive damages are authorized in a case of fraud inducing entry into a contract, as this

is." (Campbell v. McClure (1986) 182 Cal.App.3d 806, 808, fn. 1; see also Horn v. Guaranty Chevrolet Motors (1969) 270 Cal.App.2d 477, 484.)

Both the trial judge and the jury found that Shell had perpetrated a fraud on the Nelsons. At the conclusion of the court trial with respect to the right to rescind, the trial court made substantial factual findings on this issue, including the fact that Shell pressured Mr. Nelson to extend the lease agreements; that Nelson resisted until he became ill; that when Nelson was suffering from advanced heart disease and senility, Shell threatened to collect some $5,600 in overpaid rent if the contract were not signed; and that Shell kept from the Nelsons the status of the Century Freeway condemnation action.

In our prior decision, we affirmed the finding of fraud and the Nelson's right to rescind the contract. The matter was remanded solely because no evidence of actual damages had been presented in the rescission trial. At the retrial, evidence was introduced, as set out supra, establishing that general damages were in fact suffered by the Nelson Trust.

The Nelson Trust presented evidence of the most recent annual financial statement of Shell, offered as proof of its financial condition. (Adams v. Murakami (1991) 54 Cal.3d 105, 111.)

Once general damages were established at the conclusion of the second trial, both sides having waived jury on the punitive damages issue, the trial court could have, but did not re-

impose the $1,887,375 punitive damage award. This figure was not excessive as a matter of law. It was supported by the evidence and bears a reasonable relationship to general damages.

b. The same is not true, however, with respect to the increase in punitive damages which the trial court imposed at the conclusion of the retrial. With respect to this issue, Shell raises two contentions.

Shell contends that the court erred when it based its increased award of punitive damages on evidence admitted, over objection, regarding use of the base lease manual subsequent to 1987, the year of the earlier trial. This contention is without merit. As in any civil trial based on tortious conduct, evidence of the defendant's continuing bad acts is

relevant to the issue of malice. (Hilliard v. A.H.Robins Co. (1983) 148 Cal.App.3d 374, 400-401.)

Shell further argues that even if properly admitted, this evidence is insufficient to support the increased award. The following evidence on the continuing use of the base lease manual by Shell was presented:

Prior to the retrial, the Nelson Trust had subpoenaed from Shell "any and all writings or documents wherein Shell either modified, withdrew, repudiated or otherwise prevented or discouraged the continued use of its base lease manual or any part thereof (since July 1987)." No documents were produced in response to that subpoena, and counsel for Shell stipulated that no such documents exist.

Mr. Drager, Shell's real estate manager testified that, since 1987, he had not prepared any communication discussing or modifying the use of the manual, nor had he seen such a document. He also testified that since 1987 he had not directed anyone to use the manual and was not aware if one was available in his office.

With the exception of the foregoing, the only occurrence between the first and second trials was the passage of time. There is no justification for the increase in the punitive award from the approximately $1.9 million, which was reasonably justified by the state of the record, to the much greater $6.295 million award, which was not.

The trial court interpreted the evidence in the second trial as estab-

lishing that Shell was continuing to utilize the "manipulative techniques advanced in the manual." However, this conclusion is simply not supported by the evidence. It is equally reasonable to conclude on the basis of what was testified to that Shell no longer uses the manual or the procedures it espouses. The Nelson Trust did not meet its burden on this issue. We conclude that the court abused its discretion in assessing punitive damages of $6.295 million.

c. Shell asserts that there was no evidence that it ratified the fraudulent conduct which induced the Nelsons to agree to the three five-year extensions. We rejected this argument when it was raised in Shell's earlier appeal, where we affirmed the judgment of rescission based upon fraud. After summarizing the

evidence presented regarding the base lease manual, we concluded that the instructions contained therein "establish Shell's authorization and ratification of the practices promoted in the Manual."

Moreover, we note that when a master or principal asserts that punitive damages cannot be imposed upon it for the acts of its agents, "the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy." (Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 822-823.) In the instant situation, no one disputes that Mr. Lewis was authorized to enter into the contract for the three five-year extensions with the Nelsons, thereby binding Shell to its terms. We conclude, therefore, that he did possess sufficient discretion for the

law to impute his actions to Shell. (Ibid.)

d. Constitutionality. Shell challenges the constitutionality of the punitive damages award, asserting that the absence of objective standards deprives it of due process. This argument has been considered and rejected by both the United States and our Supreme Court. (See Pacific Mutual Life Insurance Co. v. Haslip (1991) _____ U.S. _____ [113 L.Ed.2d 1]; Hasson v. Ford Motor Co. (1982) 32 Cal.3d 388, 402, fn. 2.)

DISPOSITION

The judgment awarding damages is modified to strike the following items of general damages: $60,000 costs of litigation, $10,060 income taxes, and $126 Internal Revenue Tax penalty; as

modified, the award of general damages is affirmed.

We also strike as excessive the judgment awarding $6.295 million in punitive damages. It appearing that all of the evidence necessary to a determination of the issue of punitive damages is before the court, we see no necessity for a further trial. It only remains for the trial court to arrive at an amount of punitive damages supported by the evidence. The matter is remanded for the trial court to assess and award punitive damages consistent with the views expressed in this opinion. Each side is to bear its own costs on appeal.

NOT TO BE PUBLISHED

Cooper, J.******

We concur:

WOODS (Arleigh), P. J.

EPSTEIN, J.

******Assigned by the Chairperson of the Judicial Council.

turned 80 years old.[6]/

Mr. Nelson and Lewis met at the dinette table, and Mrs. Nelson was never more than six feet away, in the kitchen or living room. Mr. Nelson had discussed Shell's overpayment with Mrs. Nelson after Lewis' call, and Mrs. Nelson was very interested in their discussion. Mrs. Nelson heard Lewis explain to Mr. Nelson that he had two choices--either pay back the $5,625 overpayment or agree to an additional 15 year lease on the lot in exchange for Shell forgiving the indebtedness. Mr. Nelson proposed that a "cost of living" rental increase be included in the lease. Lewis unequivocally rejected this idea. Lewis stated that Shell was very happy with the

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[6] Mr. Nelson died approximately one year later.

station location, looked forward to many years of business there, and had long-range plans for it. He also reminded Mr. Nelson that the monthly rental check would be comforting to Mrs. Nelson and offer financial security for her should anything happen to him.

The meeting lasted between thirty minutes to an hour. Mrs. Nelson felt Lewis created an atmosphere of urgency during this meeting. No mention was made of the Century Freeway or possible condemnation of the property by Caltrans.[7]/ Mrs. Nelson had no

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[7] Lewis testified that he was ignorant concerning the progress of the Century Freeway, and his knowledge of the freeway was no greater than that of the average person reading the newspapers and watching television. He also testified, however, that he knew that the freeway was not being abandoned, that Caltrans was preparing an environmental impact report at great expense to comply with the Court order, that three cities which

information at that time about any possible effect the Century Freeway might have on the property. By the time Lewis left, Mr. Nelson had agreed to the three five-year options to extend the lease to 2001. All other lease terms remained the same.

On June 8, 1978, approximately 10.5 years before the lease expiration date, both the Nelsons signed the "Agreement Amending Lease." The agreement was a one-page document which provided that the monthly rent in 2001 would be $1200 and incorporated by reference the terms of

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originally had objected to the freeway route had withdrawn their objections, and that the freeway was still a possibility as of June 1978. Moreover, during the period while the injunction was in effect, Lewis had handled a transaction for Shell which conveyed to him knowledge that the State was still interested in proceeding with the freeway, and was buying property in the corridor from owners who would voluntarily sell.

the 1960 lease. It was executed by Shell on June 20, 1978. Mrs. Nelson signed the agreement because she trusted her husband's judgment and realized that in order to repay the $5625 they would have had to borrow or sell stock, thereby reducing their income. From the time the Nelsons received the first call from Lewis to the time they signed the agreement, three days had elapsed.

In 1978, Lewis knew that the State compensated the owners of property it condemned and that a lessee who had a right into the future beyond the period of condemnation was entitled to make a claim for a certain percentage of the overall state payment for the property. He was also aware that options counted in determining the length of the lease, and that the lower the rent the more Shell's

claim in condemnation was worth.

Several training and policy manuals were available to Shell real estate representatives. One such manual was the Shell Base Lease Manual. During their training seminar, real estate representatives were instructed to follow the procedures outlined in the Base Lease Manual.[8]/ It offered tips on how to approach certain issues and to persuade owners to accept various lease provisions

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[8] During his trial testimony, Robert S. Drager, Shell's District Real Estate Representative at the time of trial, testified that he had not been given the Base Lease Manual during his training seminar nor did he recall being instructed to use it. His deposition testimony, however was to the contrary. He further testified he had never been trained to extend a lease in order to obtain a greater portion of a condemnation award; and he, personally, would disclose the possibility of state condemnation during negotiations with a property owner if he were aware that it might occur.

favorable to Shell, including purchase options, lease amendments, and extension options. Shell also printed a Condemnation Manual, which instructed the real estate representatives to keep abreast of developments upon discovering that a condemnation might occur.

Among the tips described in the Base Lease Manual, were suggestions on how to minimize a lease feature by hurrying along, joking, or grouping together and dismissing as unimportant the desired feature; on how to convince an owner to pay his or her own property taxes; on how to effectuate inclusion of the "use the premises for any lawful purpose" phrase. The Manual emphasizes the importance of timing in renewal negotiations; the advantages of placing the owner in a "defensive position" and in a "frustrated

position"; and directs the real estate representatives to "be familiar with all instructions relating to condemnations." It further suggests that when Shell wants to secure a long term lease from "an owner who is middle-aged or slightly beyond," the representative should tell the owner that "a long lease gives ... security of income for ... old age, ..." It suggests reminding an owner that, "After a man dies, his family is always better off if it has a steady income.... It is very difficult to plan an estate on a short-term lease. Widows and children need the protection afforded by the experience and ability of a successful business man. That protection can be extended by an owner through the use of long-term lease."

As of June, 1978, the date when

Lewis obtained the lease extension from the Nelsons, all governmental bodies and officials responsible for implementing the freeway had indicated their approval of the project. As of that time, Caltrans was publicly expressing optimism that the freeway would proceed and was so advising any member of the public that inquired. The United States Department of Transportation was taking the same position in response to inquiries from the public.

In October, 1979, the federal court dissolved its injunction stopping construction of the Century Freeway. Lewis did not inform Mrs. Nelson that his representation that Shell looked forward to pumping gas for many years into the future was mistaken; nor did he inform her that his representations that the

extensions would give her financial security was mistaken.

Mrs. Nelson first learned of the condemnation when she received a letter, dated March 14, 1983, from Caltrans. She learned that Shell was making a claim on the condemnation proceeds on November 19, 1984.

On February 1, 1985, Shell claimed that the 1978 extensions entitled it to two-thirds of the condemnation award. At trial, Shell's expert witness testified that the value of Shell's leasehold interest was $620,000, based upon his professed opinion that the fair rental value of the Nelson property was $7900 per month, almost $7000 per month more than the rent called for by the options.

PROCEDURAL HISTORY

On June 18, 1985, Caltrans filed a complaint in eminent domain against the Nelsons and Shell, alleging that the subject property was necessary for highway construction. On September 4, 1985, Nelson filed a cross-complaint against Shell. The remedies sought were (1) rescission of the three five-year options negotiated in 1978; and (2) damages for fraud, constructive fraud, and intentional infliction of emotional distress.

On October 27, 1986, an Interlocutory Judgment of Condemnation was filed. Under its terms, the State agreed to pay the sum of $975,000 to Shell and Nelson, jointly, representing the total value of their combined interests in the property. The

apportionment of that sum between the parties was left to be resolved at trial. Shell presented a claim for $620,000.

Prior to trial various matters were determined by the Court to be without substantial controversy. (Code Civ. Proc., Sect. 437c.)[9]/

Prior to commencement of trial, Shell filed a Motion in Limine, seeking to exclude mention of various matters during trial. Among the motions which were granted was an order that Nelson not make, "Any reference to any settlement

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[9] Pertinent to this appeal is the following fact found to be without substantial controversy: "5. That at all times material to this litigation, the only relationship that existed between Shell-Lewis on the one hand, and the Nelsons on the other, was that of lessor and lessee of a piece of real property and improvements thereon. That at no time did Shell-Lewis, or either of them, stand in any fiduciary relationship to the Nelsons."

negotiations between any of the parties in this action, including without limitation, any reference to any offer of settlement and response thereto.... " Also granted was an order that Nelson not make "Any reference to any fact which either directly or indirectly contradicts those facts which have been found by the Court to be without substantial controversy.... "

Trial commenced on June 5, 1987. The causes of action for fraud, constructive fraud and intentional infliction of emotional distress were tried to the jury. On July 21, 1987, the jury returned its special verdicts. In summary, the jury found that Shell had suppressed a material fact but without intent to defraud Nelson; that Shell intentionally made a false representation

as to past or existing material fact; that Shell made the representation with an intent to defraud Nelson, and Nelson, unaware of the falsity, acted in justifiable reliance upon the truth of the representation; and that Nelson was damaged as a result of this reliance upon the truth of the representation in the amount of $154,150. The jury awarded Nelson $235,600 in punitive damages and valued Shell's leasehold interest at $235,600.

On September 18, 1987, the trial court granted Nelson a new trial on the issues of compensatory and punitive damages on the fraud cause of action.

On the rescission cause of action, the trial court granted Nelson rescission and awarded punitive damages of $1,900,000, deducting $5625 (rent

overpayments) and $7000 (value of Shell's leasehold interest in the remainder of the original lease). The court's order granting the partial new trial and rescinding the options and its Nunc pro Tunc order correcting it are attached to this opinion as Appendix A.

On July 27, 1987, judgment on the jury's special verdicts was filed as was the judgment on the court's verdict. In the latter, the court reserved jurisdiction to award damages and further apportion the condemnation proceeds. At the trial court level, Nelson did not elect a remedy.

ISSUES ON APPEAL

Shell has raised numerous issues on appeal, attacking the validity of the jury verdicts and the court verdict. In the Nelson's responding brief and at oral